United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4267

76-4267 B P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

GENERAL DYNAMICS CORPORATION

Petitioner

against

JUDITH ANN WEBER

Respondent

ON PETITION TO REVIEW ORDER OF BENEFITS REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR, BRB NO. 76-129

RESPONDENT-CLAIMANT'S BRIEF

O'BRIEN, SHAFNER, GARVEY
BARTINIK & STUART

500 Bridge Street Extension
Groton, Connecticut 06340

Attorneys for
Respondent-Claimant

MATTHEW SHAFNER
of Counsel

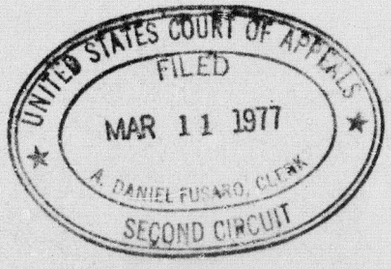

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

ISSUE

Is there substantial evidence in the record as a whole to rebut the presumption that the employee's death was causally related to his employment?

STATEMENT OF THE CASE

This is an appeal by an employer of a decision of the Benefits Review Board, BRB No. 76-129, affirming a decision of Administrative Law Judge Walter J. Sullivan, 75 LHCA 479, in a claim filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq, as extended by the Defense Base Act, 42 U.S.C. 1651 et seq. (hereinafter jointly referred to as the Act).

The Administrative Law Judge found the death of the employee while on the business of his employer in Scotland to have been causally related to his employment. He ordered death benefits paid to the widow and two surviving children, funeral expenses, interest, attorney fees and costs. (2a)

The decedent was 37 years old at the time of his death. He had been married for 18 years to his childhood sweetheart

(36a) He was employed as a rigger at the Electric Boat Division of General Dynamics at Groton, Connecticut. Riggers lift heavy equipment and machinery in and out of boats (18a) using chain falls, lifts, shackles and various lifting equipment. (21a) He had a family history of heart disease, high blood pressure and diabetes. (2a) His mother had high blood pressure and his father had already suffered several heart attacks. (2a) Five uncles had died of heart attacks in their early fifties. (2a)

The decedent had disc surgery in 1969 and eye surgery in 1970 requiring laser beam treatment for a year. His eye was then physically removed to extract a piece of steel. This industrial injury caused his perception to be off. (39a) His medical records showed that he had a border line elevated glucose tolerance test indicating the possibility of diabetes. (44a) In June of 1974 he experienced breathing difficulties while at work. The employer's nurse advised him "that his blood pressure was extremely high." (2a)

In the summer of 1974, the employer assembled a crew to refit and repair a submarine in Scotland. (2a) At first the decedent did not want to take the trip and was apprehensive. He had never been out of the country before.

He had never flown before. He had never been separated from his family before. (2a) The sudden death of a close friend, neighbor, and father-figure occured several weeks before the trip caused him additional distress. (44a) However, he finally decided to go because his working partner was going, and he could use the extra money. (41a)

Shortly before leaving for Scotland, the decedent told his wife that he had changed his mind and did not want to go, but felt it was too late to back down. The night before the trip, he became very quiet and broke down crying. (3a) The only time he cried before was when there was a tragedy in the family. (Tr. 63)

While traveling to the airport the employer's bus had a flat tire and the crew was late. They were rushed through the airport and barely got their luggage and tickets taken care of in time to board the plane. (22a)

In Scotland, the decedent found the conditions to be far from ideal. He stayed in a hotel furnished by his employer (25a) which was cold and damp. (52a). The hotel towels were changed infrequently and were usually damp. The food was poor and lunches supplied by the hotel were cold. (52a)

The weather was unpredictable, changing from bright sun to sudden downpour. (56a) In his first letter to his family the decedent described the scary flight and said "the weather here is something different than you could imagine." (3a) The temperature was in the 40's during the day and the 30's at night.

It was the worst season in Holy Loch in 30 years. (52a) It rained every day and the wind seemed to rise to gale force at night. (27a)

The weather took its toll, and most of the men caught colds or bronchial infections. They had difficulty in obtaining medicine (52a). The employer had supplied rain and foul weather gear but this had been lost (52a) and as a result, the crew was forced to work in wet clothes (27a). The decedent worked both in and out of the submarine. (27a - 29a) The decedent was soaked his first day in Scotland, developed a cold (3a) and worked in wet clothing the day before he died. (52a)

The first thing the decedent did upon arriving in Scotland was to try to call his family. It took him eight hours to get through and then the connection was so poor he could not hear what his wife was saying. He spoke of being scared on the flight, and told her of the

trouble he was having cashing checks. He was very upset, his voice quivered and he broke down crying again. (46a)

The decedent's normal shift in Connecticut was 8 hours, 11:30 P.M. to 7:30 A.M. Monday through Friday. In Scotland his work day was almost 12 hours, from 3:30 P.M. to 3:00 A.M. portal to portal. He worked 6 days a week. A company bus would pick him up at the hotel and transport him to a dock at Holy Loch. There he boarded a Navy launch which took him to a Navy tender and submarine anchored in the Loch. From the launch he had to climb three flights of stairs onto the deck of the tender, cross the deck and climb down a similar stairway into the submarine. Sunday was his only day off. (4a) The decedent was one of only two riggers on the night shift. They performed the work of six men and were involved in lifting duties all over the boat. (31a) There did not seem to be enough time for the work they had to do. (31a) Since the main group of men had not yet arrived, the decedent had to carry an extra load. (50a) The work had become more strenuous by the end of the week and the decedent had become run down and exhausted. (33a)

On Sunday, his first day off, at dinner he complained of chest pains and looked pale. He walked upstairs to his room at noon and died at 3:10 P.M. from a myocardial infarction. (4a)

Dr. Geddes attended the decedent and did not think that his working conditions contributed to his death. (4a) Dr. Sagall reviewed some records of the employer and stated that the myocardial infarction was the result of a "natural, spontaneous and inevitable progression of underlying coronary artery heart disease, a non-industrial disease process, unrelated to his work activities for General Dynamics". (5a) Neither Dr. Geddes nor Dr. Sagall, however, considered the stress that the decedent was under at this time. (9a)

Dr. Spitz directed his report to the specific matter of stress, and stated that "stress can be a precipitating factor in coronary artery disease." Although it is difficult to define exactly what constitutes stress in a given situation it should generally be foreign to the individual's usual situation. Whether the amount of stress would be sufficient to produce a myocardial infarction in a specific case "would be largely influenced by the patient's profile regarding risk factors of coronary artery disease such as diabetes, hypertension, family history, lipid levels and the like". (4,5a)

ARGUMENT

In the absence of substantial evidence to the contrary, there is a presumption under the Act that an injury for which compensation is claimed arose out of and in the course of employment. 33 U.S.C. 920,(a) Swinton v. Kelly, Inc., No. 74-1164, February 3, 1976 (C.C.A. D.C.). In accordance with the humanitarian purpose of the Act, the claimant is entitled to the benefit of this presumption unless it is shown that the injury is so disconnected from the employment that it would be entirely unreasonable to say that his injury arose out of and in the course of his employment.

The Act is to be construed liberally in favor of the employee, Pillsbury v. United Engineering Co., 324 U.S. 197, (1952) and all doubts, including factual ones are to be resolved in his favor. Friend v. Britton 220 F.2d 820. Section 20 of the Act, 33 U.S.C. 920, affords the employee a presumption of compensability. In order to overcome the presumption of compensability the employer must produce facts, not speculation. Reliance on hypothetical probabilities in rejecting a claim is contrary to the presumption created in Section 20. Steele v. Adler, 269 F. Supp. 376.

An employer accepts an employee as he finds him and subject to the physical disabilities he has. Where sickness and death result from overexertion as to that particular employee, the resulting disability or death is compensable. Pacific Employees v. Pillsbury, 61 F.2d, 101.

In the case of United Paperboard vs. Lewis, 117 NE 276, quoted with approval in Todd Dry Docks v. Marshall, 61 F.2d, 673, it was stated:

> "It is generally accepted that a disease, which is not the ordinary result of an employee's work, reasonably to be anticipated as a result of pursuing the same, but contracted as a direct result of unusual circumstances connected therewith, is to be considered an injury by accident..."

It is well settled that it is within the province of the trier of fact to weigh the evidence and determine the credibility of witnesses, and his conclusions upon such matters are generally controlling upon the reviewing tribunal. O'Keefe v. Smith Associates, 380 U.S. 359 (1965). In reviewing findings of the trier of fact, the reviewing body may not reweigh evidence, but may only inquire into the existance of substantial evidence to support the findings. South Chicago Coal and Dock Co. v. Bassett, 104 F.2d 522 aff'd. 309 U.S. 251 (1940).

Accidental death includes an unexpected and undesigned consequence of the work or working conditions which hastens an employee's death. Harbor Marine v. Lowe, 152 F.2d, 845.

Larson, in his Workmen's Compensation Law, devotes a special section to emotional strain cases. In Section 38.65 he states that the unusual nature of the claimant's employment is a substantial factor to be considered in awarding compensation. He cites with approval Hoage v. Royal Indemnity, 90 F.2d 387 which concerns an overworked claims adjuster, whose subsequent coronary was held to be compensable. Larson also cites cases involving undue pressures on an insurance commissioner, stress on a workmen compensation referee handling an extra caseload and dealing with several emotional claimants, and a Judge handling a heavy backlog of cases - all sufficient to bring these types of cases within the ambit of compensation coverage.

Larson describes the essence of the problem as legal causation--that is, evidence of exertion or exposure to satisfy the requirement of "arising out of the employment." This is to be distinguished from medical causation as to whether the actual exertion or exposure in any particular case in fact caused the employee's actual

collapse. In heart attack cases involving a pre-existing condition, the employment should involve some exertion greater than that of the non-employment activity. If there is no pre-existing heart condition, however, then any exertion connected with employment which medically connected with the collapse should be adequate to satisfy the legal test for causation.

Applying the above cases and principles to this case, it is undisputed that the employer took the soon-to-be decedent with an extremely high predisposition towards a coronary, worked him for 10 to 12 hours a day, 6 days a week in unusually severe weather, in rain soaked clothing performing the workload of three men, all beyond his usual living and working conditions. The causal connection, both legal and medical, would seem to be apparent. The fact that the employee's prior disposition to coronary disease may have had little connection with the employment is of no significance in determining the question of compensation under the Act. Pacific Employees v. Pillsbury, Supra.

Some of the predisposing factors were in fact, however, employment-related. These include the eye injury in 1970, the incident during the summer before his

trip to Scotland resulting in his visit to the company medical facility, the transportation problems encountered prior to departure, the fear encountered aboard the flight, the difficulties in cashing checks contrary to the provisions made by the employer, the inferior accommodations provided by the employer, the inadequate heating and food, the severe weather conditions, working in saturated work clothes, the unusual demands required by the adverse weather, coming down with a cold and exhausting working conditions. The family history, back surgery, borderline diabetes and death of a friend of course were not employment related.

Where an employee has a predisposition to arterial aneurysm and then overexerts himself at work, the resulting death is compensable. Southern Shipping v. Lawson, 5 F.Supp. 321.

Dr. Sagall was either not given the information or chose not to discuss the extreme differences in weather and working conditions, the stress to which the claimant had been subjected by prior injuries, the emotional strain of separation from his wife, the further stress of the untimely death of a close friend, the annoying but cumulative strains of check cashing problems, communication problems

with his wife from whom he had never been separated before, the family medical history, and personal medical background. In fact, the lack of any discussion or opinion in Dr. Sagall's or Dr. Geddes' reports concerning the differences in working conditions, additional exertion required, the physical exhaustion experienced by the end of the week, the additional climbing and heavier workload due to lack of personnel, the housing accommodations and finally the severe weather conditions encountered in Scotland led the Administrative Law Judge to substantially discount the employer's medical reports.

The question arises whether the fact that the employee manifests the symptoms of his ultimate injury on his day off has any bearing on whether his injury arises "in the course of" employment.

"In the course of employment" refers to the time, place and circumstances of the injury. "Arising out of employment" refers to the employment as the cause or source of the injury. McWilliams Dredging v. Henderson, 36 F.Supp. 361. There is no question but that the time, place and circumstances of the claimant dictated that the claimant be in Scotland on the business of his employer, at accomodations furnished by the employer.

His death certainly arose "in the course of his employment." Did it then "arise out of the employment?"

When an illness occurs in the course of employment, the presumption that it "arose out of the employment" is strengthened and all doubts are to be resolved in favor of the claimant Wheatley v. Adler, 407 F.2d 307. Section 20 of the Act places the burden on the employer to go forward with evidence to meet the presumption that illness occurring during employment is caused by that employment; to overcome the presumption, the employer must introduce substantial evidence that the illness was not work-related. Butler v. District Parking Management Co., 363 F.2d 682.

The claimant introduced substantial evidence tending to prove the death was caused by the working conditions imposed upon the decedent. The employer introduced insufficient or discredited evidence to counter the substantial evidence of "devasting stress." (9a) The inference was inescapable to the Administrative Law Judge that death was precipitated by the work environment without the benefit of the presumption. This conclusion was certainly strengthened by the presumption of Section 20 and further by the fact that this case arose under the Defense Base Act 42 U.S.C. 1651, et seq.

When reading the cases arising under the Defense Base Act, one must conclude that coverage as to time and place of injury, as well as cause of injury, is extended far beyond those cases which otherwise arise under the Act.

In the case of Page Communication v. Arrien, 315 F. Supp. 569, an employee working in Viet Nam accidentally electrocuted himself in his hotel room on a Sunday while playing with his tape recorder. There was no evidence of any employment purpose of the activity. It was held that the death occurred in a zone of special danger, that the employee was there because of his employment and that the contract of employment required the employee to move from place to place. It was further held that the fact that the employee's accidental death occurred while occupying necessary quarters was sufficient to bring the claimant within the coverage provided by the Defense Base Act:

> "...if in the course of employment, an employee suffers an injury by reason of a risk incident to the location where the employment requires him to be, that injury arises out of employment".

The same principle should apply with added force where employees are working in a defense base coverage area away from their homes. Amalgamated Association of Street and Electrical Railway Employees v. Adler, 119 F. Supp. 274, 340 F.2d. 799.

In the case of Pan American Airways v. Willard, 99 F. Supp. 257, an employee was found to be in good health before traveling to Brazil on business in 1942. On his return to the United States 22 months later, he had a skin condition aggravated by exposure to the sun. He died in 1947 as a result of the condition. It was held that the exposure to unusual sunlight arose out of the decedent's employment and was compensable.

The case of O'Keefe v. Smith, supra, involved an employee working at a defense base in South Korea. On his day off, he went to visit a friend who owned a cottage on a lake. He and his friend decided to go out in a small boat to get some sand to build a beach in front of the cottage. The rowboat sank and the decedent drowned in the middle of the lake. His death was held to be compensable.

In the case of Contractors v. Pillsbury, 150 F. 2d 310, the employee was a male nurse, truckdriver and steward in the mess hall on the Island of Samoa. During the rainy season it rained 4-5 times daily and he would frequently become drenched. The rainfall was 190 inches in a year and the temperature was 90-100 degrees. He worked 12 to 16 hours a day and after several months developed tuberculosis.

The Deputy Commissioner found the infection was from unknown sources, or was a reactivation of a previously arrested tubercular condition caused by his employment. The employee's overwork and exposure to the elements contributed to the finding, as was the failure of the employer to furnish proper medical treatment required by Section 7(a) of the Act. The Court ruled that "injury" includes a latent or undisclosed condition which is caused to flare into a virulent state of activity.

In the case of Lockheed v. Pillsbury, 52 F.Supp. 997, an employee had a latent condition of tuberculosis. He was sent to work at a military base in Great Britain. While on route, he caught cold aboard ship. This condition was caused or aggravated by the crowded conditions on board ship and the prevalence of respiratory infections among other passengers. In England the cold became worse due to climate changes. The claimant performed hard manual work for one week, then developed chest pains and fatigue. Subsequent examination revealed active tuberculosis which was held to be compensable.

In the case of Gilbert Pacific v. Donovan, 198 F.Supp. 297, aff'd. 304 F.2d 882, an employee had a quiescent tubercular condition, but was otherwise in good

health. He worked in Okinowa among natives who themselves developed tuberculosis at 4 to 8 times the rate of the claimant's home community. The employee's development of tuberculosis was held compensable notwithstanding the fact that TB had been found in only three Okinowans.

In the case of Liberty Mutual v. Gray, 137 F.2d 926, an employee in Hawaii took a day off and overstayed his leave. To return to the employer's facilities, the claimant obtained a ride with a third party and was injured in an accident on the return trip. The Court found that the return to work from recreation was part of the employment and the injury was compensable.

It has been held that employment on Grand Turk Island creates its own zone of special danger linking injury with the place of employment. The injury occurred during recreation activities during the employee's own leisure time. O'Keefe v. Pan American, 338 F.2d. 319.

In Turner v. Willard, 154 F. Supp. 352 an employee on a Pacific island was driving from one construction project to another to confer about an employee bowling league which was promoted by the employer. It was held that an injury occurring during his trip came within the scope of employment and was compensable.

An employee using the employer's recreational facilities on Guam drowned while trying to rescue a third party who was a nonemployee. The employee had gone into restricted waters outside the employer's premises. The death was held to be compensable. O'Leary v. Brown-Pacific Mason, 340 U.S. 504 (1951).

The fact that death took place on the employee's only day off should make no difference in the outcome of this case. The hotel in which the decedent died was furnished by the employer. Death occurred after a meal furnished by the employer, and followed a climb up the hotel stairway after becoming pale and experiencing chest pains.

The "special zones of danger" do not all involve war or hostilities e.g. cases arising on Guam, Okinawa, South Korea, and Samoa. The dangers must logically include weather and who can say that the worst season in Scotland in 30 years did not create a zone of danger for this crew of workers from Connecticut. The frequency of bronchial infection among the crew was one reflection of the adverse conditions.

Death arose out of and in the course of employment. There is substantial evidence in the record on which the

Administrative Law Judge could and did base his findings. This conclusion is well supported whether one defines the issue to be whether there is sufficient evidence to rebut the presumption of Section 20 of the Act favoring compensability or whether there is sufficient evidence to support the finding that death arose out of and in the course of employment. The evidence in this case, viewing the record as a whole, is substantial and supports the conclusion that death was causally related to the working conditions and environment in Scotland, under either view of the burden of proof.

CONCLUSION

The decision of the Benefits Review Board upholding the Administrative Law Judge is neither arbitrary, capricious nor in abuse of discretion. The decision finding the death of the decedent causally related to his employment is amply supported by substantial evidence considering the record as a whole. There is no substantial evidence to rebut the presumption that death arose out of and in the course of employment. The petition should be denied and the Board's decision affirmed.

Respectfully submitted,

O'BRIEN, SHAFNER, GARVEY,
BARTINIK & STUART
Attorneys for Respondent-
Claimant

Matthew Shafner
of Counsel

March 9, 1977